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In The
Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., ET AL.,

Petitioners,

v.

GROKSTER, LTD., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS IN SUPPORT OF PETITIONERS

ALAN R. MALASKY
Counsel of Record
MELANIE MARTIN-JONES
HEATHER J. STEWART
PORTER WRIGHT MORRIS & ARTHUR, LLP
1919 Pennsylvania Ave., N.W.,
Suite 500
Washington, D.C. 20006
(202) 778-3000

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

For nearly five decades, the National Association of Recording Merchandisers ("NARM") has been the voice of music retailing in the United States. Founded in 1958, NARM serves the music and other prerecorded home entertainment software industries through advocacy, networking, information, education and promotion. NARM's diverse membership, totaling 529 companies and individuals, includes brick-and-mortar, online and "click-and-mortar" retailers; wholesalers and distributors of prerecorded music, video and video games; as well as music labels, video and video game suppliers, suppliers of related products and services, artist managers, consultants, marketers, and educators in the music business field.[2] While NARM's retailer members sell prerecorded

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[1] This brief was not authored, in whole or in part, by counsel for either party in this matter. No person or entity other than the *amicus curiae*, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

The parties have consented to the filing of *amicus curiae* briefs in this matter and the parties' letters of consent have been filed with the Clerk of Court.

[2] As the primary mission of NARM is to serve its retailer members, only retailers and the wholesalers who service them are eligible to be General (i.e., voting) members of NARM. Music labels, video and video game suppliers, and their respective distribution subsidiaries, are eligible to be Associate (i.e., non-voting) members of NARM. Other non-voting categories of membership include "Affiliate" and "Individual" members. The following non-voting NARM members are either parties to this proceeding, or are subsidiaries or divisions of parties to these proceedings: Columbia Tri-Star Home Entertainment, Paramount Home Entertainment, Atlantic Records, Rhino/WSM, Capitol Records, Hollywood Records, Interscope Geffen A&M Records, Universal Motown Records Group, RCA Label Group, Sony Label Group, Sony BMG Sales Enterprise, Universal Music, Virgin Records America, Walt Disney Records, Warner Bros. Records Inc., WEA Corp and Zomba Label Group.

music in physical and digital forms (both in-store and online), a significant number of such members also sell electronic hardware and related products and services, including iPods, MP3 players, CD burners, TiVo® and the like.

NARM's retailer members account for approximately 85% of the prerecorded music sold in the United States, or about 706 million units in 2004. NARM members include large national and regional specialty music retailer chains, such as The Musicland Group (908 stores) and Trans World Entertainment (850 stores); mass merchant retailers, such as Target (1195 stores), Best Buy (661 stores) and Circuit City (620 stores); mid-size independent retailers, such as New England-based Newbury Comics (25 stores) and Texas-based Hastings Entertainment, Inc. (151 stores); and small independent retailers across the country, such as Record Archive in Rochester, New York (2 stores), George's Music Room in Chicago (2 stores), Homer's in Nebraska (6 stores) and J&R Music World, which operates one retail store in New York City, but also conducts an extensive nationwide mail order business. NARM's members also include wholesalers that supply and serve some of the largest national chains, such as Anderson Merchandisers and Handleman Company ("rack jobbers" that serve Wal-Mart and K-Mart), and "one stops," such as Alliance One Stop Group, that generally serve smaller independent retailers. Several retailers that operate exclusively online are also NARM members.

NARM's supplier and distributor members account for approximately 90% of the music produced for the United States market. NARM's supplier members include various music labels and home entertainment software businesses.

These members include the four major music companies – Universal, Sony BMG, Warner and EMI – and many of the labels they represent, such as Island Def Jam, Sony Classical, RCA, Atlantic and Capitol Records. NARM members also include independent record labels, such as Alligator Records and Righteous Babe Records. NARM member distributors include branch distributors that distribute major music label products, such as Universal Music and Video Distribution and WEA (Warner), and independent distributors for independent (i.e., non-major) music labels, such as Narvarre Entertainment Media and Koch Entertainment Distribution.

NARM's perspective is unique because its members have an important stake both in protecting the legitimate interests of copyright owners *and* in preserving the freedom of companies to develop new technology that may interact with copyrighted works, such as iPods, MP3 players, CD Burners, TiVo® and the like. NARM members sell products that are at the very fulcrum of the balance that was struck by this Court over two decades ago in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony*").

NARM has publicly condemned and strongly opposes copyright infringement and piracy of intellectual property in all forms, whether through physical or digital means. NARM has actively supported legislative and other efforts to educate consumers and the public regarding the devastating impact of copyright infringement and piracy.[3]

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[3] NARM has and continues to support the Recording Industry Association of America's Music United Coalition, which seeks to educate consumers about illegal file-sharing. NARM also works with the Global

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Although retailer and wholesaler NARM members are generally not copyright owners themselves, they are, in fact, directly harmed by infringement and piracy because their businesses are built on commerce in lawfully made copies of music and other entertainment software (in physical and digital forms), as well as on commerce in the equipment used to enjoy music, videos, games and similar products. NARM members serve the public by promoting broad dissemination of music and other home entertainment software, and they expend significant resources in so doing. Businesses engaged in the lawful dissemination of music and other entertainment, for which copyright owners are compensated, are placed at great risk when forced to compete with cheaper pirated products, let alone with millions of illegitimate products available for free through Respondents' services and networks. For example, many NARM brick-and-mortar members, such as Circuit City, Hastings, J&R Music World, Millennium Music, Musicland, Tower Records, Trans World Entertainment, Virgin Entertainment Group and others, as well as several retailer members that operate exclusively online, sell authorized digital copies of music and videos that must

Entertainment Retailers Association to facilitate anti-piracy efforts, including the promotion of a profitable business model for the distribution of digital distribution of music that will benefit consumers, artists, suppliers and retailers. NARM has also joined four other leading entertainment retail trade associations to form the Coalition of Entertainment Retail Trade Associations (CERTA), which advocates for enforcement against, and consumer education about, piracy of copyrighted works. Through CERTA, NARM educates members of Congress and their staffs about the problems of physical and online music and movie piracy.

compete with unauthorized digital copies available for free through Respondents' services.[4]

NARM has consistently advocated for all legitimate means of bringing music to the public, and supports new and improved technology, such as satellite radio and legitimate online music distribution services that facilitate and enhance access to music, videos, games and other electronic entertainment. Immunizing services such as those operated by Respondents, whose business models are based on promoting, facilitating and profiting from copyright infringement, stifles legal innovative technology and threatens to reduce future consumer options for lawfully made copies of music and other entertainment.

NARM submits this *amicus curiae* brief in support of Petitioners' position that Respondents' services are not immunized from liability for secondary copyright infringement under *Sony*, but also to share its unique perspective regarding the fact that consumers, artists, innovators of new technologies, suppliers, distributors and retailers all have been well served by the balance struck by this Court in *Sony*, and to urge that this equilibrium should remain intact.

[4] In addition, a number of NARM retailers have begun exploring and testing new and innovative in-store kiosks and related systems that enable consumers to lawfully download, make (i.e., "burn") and purchase their own customized CDs with music of their choice, including songs from different artists or different genres of music.

SUMMARY OF ARGUMENT

Under the unique facts in this case, the imposition of secondary liability for copyright infringement is plainly appropriate. It is undisputed that Respondents' services are overwhelmingly used for infringing purposes, and, in fact, Respondents' business models are based on facilitating infringement. Accordingly, this Court's decision in *Sony* does not immunize Respondents from secondary liability for copyright infringement. Further, secondary liability for copyright infringement should apply in this case where Respondents have constructive knowledge of widespread infringement, have actual knowledge of specific acts of infringement, and have deliberately blinded themselves to the millions of specific acts of infringement they induced and facilitated through their services.

While secondary liability for copyright infringement is compelled by the facts of this case, this Court should also take care not to unnecessarily disturb the careful balance struck by this Court in *Sony* between protecting copyright holders and ensuring the freedom of others to engage in substantially unrelated commerce. That balance has served consumers, artists, innovators of new technologies, retailers, suppliers and distributors well over the last two decades and should not be upset.

ARGUMENT

I. LIABILITY FOR CONTRIBUTORY COPYRIGHT INFRINGEMENT IS APPROPRIATE UNDER LONG-STANDING PRECEDENT WHERE RESPONDENTS KNOWINGLY AND DELIBERATELY FACILITATE RAMPANT COPYRIGHT INFRINGEMENT AND HAVE BUILT THEIR BUSINESSES UPON SUCH INFRINGEMENT.

Liability for contributory copyright infringement is appropriate based on the unique facts of this case, where the Respondents' business models are built upon facilitating millions of acts of copyright infringement, where their services are overwhelmingly used for infringing activity, and where Respondents deliberately designed their services in a manner that ensured that, if called upon to account for their conduct, they could claim an inability to detect or prevent specific acts of infringement.[5] Courts

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[5] As acknowledged by the Court of Appeals for the Ninth Circuit in this case, "Copyright Owners alleged that over 90% of the files exchanged through use of the 'peer-to-peer' file-sharing software offered by the [Respondents] involves copyrighted material. . . ." *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1158 (9th Cir. 2004) ("Court of Appeals Decision"). Respondents do not dispute these facts. ("The Copyright Owners assert, without serious contest by the [Respondents], that the vast majority of the files are exchanged illegally in violation of copyright law."). *Id.* at 1160.

Respondents also designed decentralized systems to blind themselves to specific acts of infringement and to avoid having the ability to prevent infringing uses. *See*, nn. 14 and 15 *infra* (blindness to specific acts of infringement and user identity through system design). Further, Respondents steadfastly refused to employ available filtering technology to prevent infringing uses of their software, although they do use such technology to prevent the sharing of pornographic materials through their software. *See MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1045 (C.D. Cal. 2003) ("District Court Decision") ("Plaintiffs note that Defendants' [Respondents'] software already

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have long held that liability for contributory infringement is appropriate where "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996), *citing*, *Gershwin*, 443 F.2d at 1162.

In its landmark *Sony* decision over two decades ago, this Court declined to impose secondary copyright infringement liability based on constructive knowledge alone where a product's or service's predominate use is legitimate and non-infringing. This Court's decision in *Sony* does not, however, protect Respondents from secondary liability for copyright infringement in this case. Respondents have both constructive and actual knowledge of widespread infringement on their services, and materially contribute to, encourage and, in fact, depend upon such infringement for their financial success. Under these circumstances, Respondents plainly should be held liable for contributory copyright infringement.

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includes optional screens for pornographic/obscene file names, and that it could just as easily screen out copyrighted song titles. Likewise, they note that the software searches 'meta data' – information beyond the filename contained in the file itself, including artist, title, album, etc. – and that an effective 'meta data' screen could likewise be implemented quite easily. Finally, Plaintiffs contend that Defendants could with relative ease employ emerging 'digital fingerprinting' technology that would block out a substantial percentage of copyrighted songs. Defendants dispute the feasibility and efficacy of these remedies.").

A. Under *Sony*, where the intended and predominant use of a product or service is copyright infringement, contributory liability for copyright infringement can be based on constructive knowledge.

Where the intended and predominant use of a product or service is copyright infringement, incidental legitimate uses of such a product or service should not serve to immunize the provider of such product or service from liability for contributory copyright infringement. To hold otherwise would turn the balance struck in *Sony* between copyright protection, on the one hand, and the freedom of others to engage in substantially unrelated areas of commerce, on the other hand, on its head.

In *Sony*, this Court was confronted with the question of whether general, i.e., "constructive," knowledge that a product might be used for infringing purposes would satisfy the knowledge requirement for contributory infringement liability where the product's uses were in fact predominantly legitimate.[6] In applying principles of secondary liability to copyright law in order to provide adequate protection for copyright holders, the Court was also mindful of not unduly extending a copyright holder's monopoly to other articles of commerce. *See Sony*, 464 U.S. at 442. To satisfy these competing concerns, the Court borrowed from the staple article of commerce doctrine "to

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[6] In *Sony*, 7.3% of all Betamax use was for authorized copying uses. *Sony*, 464 U.S. at 423. Approximately seventy-five percent (75.4%) of all Betamax use was for time shifting, which the Court went on to hold constituted a fair, and thus non-infringing, use under the Copyright Act. *Id.* at 423, 442.

strike a balance between a copyright holder's legitimate demand for effective – not merely symbolic – protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce." *Id.*

To preserve this balance, the Court found that the sale of articles of commerce "does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses." *Id.* In assessing whether the defendants in *Sony* were liable for contributory infringement based on constructive knowledge of infringement, the Court did not ask whether the Betamax VTR was capable of a single noninfringing use, but rather "[t]he question is thus whether the Betamax is capable of commercially significant noninfringing uses." *Id.* The Court based its finding of no liability for contributory infringement on the fact that the VTR was predominantly used for a non-infringing use – time-shifting. *Id.* Finding that the predominant use of time-shifting qualified as commercially significant, the Court noted that it "need not give precise content to the question of how much use is commercially significant." *Id.*

The services offered by Respondents here present the exact opposite situation. Instead of a service "widely used for legitimate, unobjectionable purposes," Respondents' services have, at best, only incidental legitimate uses. Indeed, these services are intended principally to facilitate rampant infringement, and they are used almost exclusively for infringing activities, with more than 90% of the files exchanged on each of them constituting copyright

infringement.[7] While this Court in *Sony* left undefined the outer boundaries of how limited a legitimate use can be and still be considered "commercially significant," the Grokster and StreamCast services at issue here come nowhere near that outer limit. This Court's reasoning in *Sony* was driven by the finding that the predominant use of the VTR – time-shifting – was a fair use, and thus legitimate. This essential element is conspicuously absent in the services offered by either Respondent. If simply any legitimate use would have satisfied the Court in *Sony*, the entire portion of the Court's analysis finding that the predominant use of the VTR was time-shifting – a fair use – would have been superfluous, as it was undisputed that 7.3% of the uses of the VTR were for authorized copying of sports broadcasts. *Id.* at 424.

In addition to the stark contrast between the facts in this case and those that existed in *Sony*, immunizing Respondents in this case from contributory copyright infringement liability would undermine the very underpinnings of *Sony* and the careful balance struck by the Court in that case. This Court's chief concern in *Sony* was that a finding of contributory liability based on constructive knowledge would have had the effect of extending the copyright holder's monopoly to include a product predominantly used for non-infringing purposes. In contrast, this case presents precisely the opposite danger, and compels the opposite result. Failing to hold Respondents liable for contributory copyright infringement under the facts presented in this case would effectively render protection of all copyrighted music and other entertainment content

[7] Court of Appeals Decision, 380 F.3d at 1158, 1160.

merely "symbolic" and effectively useless, thus destroying the careful balance struck by the Court in *Sony*.

B. Respondents have both constructive knowledge that their services are overwhelmingly used for copyright infringement and actual knowledge of specific acts of infringement.

Based on the overwhelming use of Respondents' services for copyright infringement, the level of knowledge required for contributory copyright infringement liability is more than satisfied by Respondents' undisputed constructive knowledge that their services were (and still are) predominantly used for infringing purposes. As the District Court below found, "Defendants [Respondents] clearly know that many if not most of those individuals who download their software subsequently use it to infringe copyrights."[8] Moreover, not only are Respondents aware that their services are overwhelmingly used for copyright infringement, they specifically built their business models to capitalize on such infringement. Respondents vigorously marketed themselves as the "next Napster" to millions of infringing users of that service, and based their revenues on advertising, rather than on user or downloading fees, racking up advertising revenue with each illegal download of an unauthorized copy of a song or video.[9]

[8] District Court Decision at 1037.

[9] The District Court referred to evidence that both Defendants marketed themselves as the "next Napster" and the financial benefit each derived from infringement through advertising. District Court Decision, 259 F. Supp. 2d at 1036, 144. *See also*, n. 10 (regarding marketing as the successor to Napster), n. 17 (regarding advertising revenues).

Respondents' actual knowledge and willful blindness to specific acts of infringement occurring through their services also meet the knowledge requirement for contributory copyright infringement liability. The District Court found that Respondents received thousands of notices of infringing conduct, a finding that was not disturbed by the Court of Appeals.[10] Despite these thousands of notices of infringement sent by Petitioners, the courts below inexplicably adopted a constrained and erroneous view of the standard for actual knowledge by requiring "specific knowledge of infringement at a time at which they contribute[d] to the infringement, and [] fail[ed] to act upon that information." *Id.*, *quoting*, the District Court's opinion, 259 F. Supp. 2d at 1036 (*citing*, *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001)).

Not only is such a temporal limitation on actual knowledge nowhere found in *Sony*, the addition of that limitation by the courts below incorrectly confused the distinction between contributory and vicarious liability for copyright infringement, and would improperly add to the

[10] With respect to actual knowledge of infringement, the District Court below referred to Plaintiffs' reliance on "a massive volume of . . . evidence, including documents suggesting that both Defendants marketed themselves as 'the next Napster,' that various searches were performed by Defendants' executives for copyrighted song titles or artists, that various internal documents reveal Defendants were aware that their users were infringing copyrights, and that Plaintiffs sent Defendants thousands of notices regarding alleged infringement." District Court Decision at 1036. In the words of the District Court, "Defendants clearly know that many if not most of those individuals who download their software subsequently use it to infringe copyrights." *Id.* at 1037. The Court of Appeals also acknowledged the specific notices of infringement sent to Respondents by Petitioners. Court of Appeals Decision at 1162.

plaintiffs' burden of proof in a claim for contributory infringement a requirement that is applicable only, if at all, in a claim for vicarious infringement.[11] Vicarious liability is based on a finding that the defendant has the right and ability to control the infringer's actions and receives a direct financial benefit from the infringement. *See Gershwin*, 443 F.2d at 1162 ("[O]ne may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."). Liability for contributory copyright infringement, however, does not rely on the defendant's right or ability to control the infringing activity.[12] Rather liability for contributory infringement is imposed where "one, who with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." *Id.* By importing into its analysis of actual knowledge what was effectively a "right and ability" to supervise the infringing action, the courts below confused elements of vicarious liability with those of contributory

[11] Two different theories of secondary liability have emerged with respect to copyright infringement, vicarious liability (grounded in the tort concept of respondeat superior) and contributory liability (grounded in the tort concept of enterprise liability). *Fonovisa*, 76 F.3d at 262, 264; *see also*, *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 402-403 (S.D.N.Y. 1966) ("Since infringement constitutes a tort, common law concepts of tort liability are relevant in fixing the scope of the statutory copyright remedy, and the basic common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor is applicable in suits arising under the Copyright Act.") (citations omitted).

[12] *See, e.g.*, 2 Paul Goldstein, *Copyright* § 6.0, at 6:4 (2d ed. 1999) ("a defendant will be liable for contributory infringement if it knew of, and contributed to, the direct infringement even though it could not control [the direct infringement].").

infringement. Had the Court of Appeals applied the appropriate legal standard, and not ignored the thousands of notices of specific acts of infringement sent to Respondents by Petitioners, the court clearly would have concluded that Respondents have "reasonable knowledge of specific infringement to satisfy the threshold knowledge requirement."[13]

Further, the lower courts also inexplicably ignored Respondents' deliberate efforts to blind themselves to specific acts of infringement,[14] as well as to the identity of infringing users.[15] For contributory copyright infringement,

[13] Court of Appeals Decision, 380 F.3d at 1162.

[14] Whereas Napster utilized a central server over which all file-sharing took place, Respondents achieved a technological work-around, eliminating the need for a central server and allowing users to share copyrighted files directly. *See* District Court Decision, 295 F. Supp. 2d at 1029 ("Grokster does not operate a centralized file-sharing network like that seen in Napster") and at 1041 ("Gnutella [used by StreamCast] is a 'true' peer-to-peer network, featuring even more decentralization than FastTrack [used by Grokster].").

[15] Although Respondents claim to have no actual knowledge of specific infringing users, their alleged blindness is by design based on the lack of a central server and no mandatory user registration. *See* Court of Appeals Decision, 380 F.3d at 1165 ("It does not appear from any of the evidence in the record that either of the defendants has the ability to block access to individual users. Grokster nominally reserves the right to terminate access, while StreamCast does not maintain a licensing agreement with persons who download Morpheus. However, given the lack of a registration and log-in process, even Grokster has no ability to actually terminate access to file-sharing functions, absent a mandatory software upgrade to all users that the particular user refuses, or IP address-blocking attempts."); *see also* n. 14 *supra* (lack of central server).

Grokster originally had a registration server that kept track of users, which it purportedly eliminated because it gave its software away for free. As a result, Grokster also conveniently eliminated its ability to track users of its software. *See, e.g.*, District Court Decision

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"[t]he standard of knowledge is objective: 'Know, or have reason to know.'" *Cassella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987) (finding defendant liable for contributory copyright infringement despite defendant's professed ignorance of the infringement where defendant should have known sale would result in copyright infringement because all parties considered copyrighted songs part of the franchise package).

It is enough that Respondents should have known of the specific acts of infringement that were occurring by the millions using their services, even if they attempted to avoid such specific knowledge. "Willful blindness is knowledge enough." *Louis Vuitton S.A. v. Lee*, 875 F.2d 584, 590 (7th Cir. 1989) (trademark infringement where defendants failed to inquire as to the genuineness of purported designer handbags despite the poor workmanship and inexpensive materials that were readily apparent). Respondents undeniably know of (and in fact depend upon) the rampant copyright infringement occurring over their services, but attempt to hide behind their system designs in a deliberate effort to avoid specific knowledge of acts of infringement. *See AMPAT/Midwest, Inc. v. Illinois Tool Works Inc.*, 896 F.2d 1035, 1042 (7th Cir. 1990) ("to know, and to want not to know because one suspects, may be, if not the same state of mind, the same degree of fault.") (citations omitted). Respondents' attempts to insulate themselves from liability through deliberate ignorance are

259 F. Supp. 2d at 1029, n. 7 ("The initial version of FastTrack licensed to Grokster did obligate Grokster to operate a registration server. A new user was required to register a unique username and e-mail address, and each subsequent use of the Grokster software verified this information against the Grokster registration server."). *Id.* at 1040.

nothing more than high-tech versions of looking the other way, with a cyber wink and a nod.

As the Ninth Circuit recognized, Respondents received specific notices from Petitioners with respect to actual infringing uses of their services. Court of Appeals Decision, 380 F.3d at 1162. By adding a temporal limitation on that knowledge, which is nowhere found in this Court's decisions, and by ignoring Respondents' willful blindness to specific acts of infringement, the courts below are allowing Respondents not only to stick their heads in the sand while they encourage flagrant copyright infringement, but also to ignore thousands of specific notices of actual infringement. Such a result flies in the face of well established principles of contributory copyright infringement law and should not be permitted to stand by this Court.

C. Respondents induce, cause, and materially contribute to copyright infringement by the users of their services.

With both actual and constructive knowledge of infringement, Respondents induce, cause, and materially contribute to the infringing conduct of the users of their services, and therefore should be held liable for contributory infringement. *Gershwin*, 443 F.2d at 1162. Respondents established business models built upon copyright infringement.[16] These business models were structured to

[16] Grokster openly sought to capture those users who had used the original Napster service to copy and download music without authorization. *See* District Court Decision 259 F. Supp. 2d at 1036 (noting Plaintiffs relied on "documents suggesting that both Defendants marketed themselves as 'the next Napster,'"). In *A&M Records v.*

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avoid liability by giving software away for free, which unsurprisingly spurred large numbers of file transfers of copyrighted works, inducing copyright infringement on a monumental scale. Respondents' revenues come from advertising that "pops-up" every time a user shares a file.[17]

Respondents also induce infringement by providing the "site and facilities" for copyright infringement. "[P]roviding the site and facilities for known infringing activity is sufficient to establish contributory liability." *Fonovisa*, 76 F.3d at 264. In *Fonovisa*, liability for contributory infringement was imposed based on a swap meet owner providing the means for vendors to infringe copyrights, such as space and electricity. *Id.* Here, Respondents provide the cyberspace version of "sites" – the networks their software creates – and "facilities" – the software itself. Further, the software or "facilities" for infringement is

Napster Inc., the Court of Appeals affirmed a finding of liability for contributory infringement based on findings that Napster facilitated transmission and retention of digital audio files by its users and had actual knowledge that specific infringing materials were available using its system. *A&M Records v. Napster Inc.*, 239 F.3d 1004, 1021-1027 (9th Cir. 2001). The court also found that Napster could block system access by suppliers of infringing material, that it failed to remove infringing material, and that its service materially contributed to infringing activity by providing site and facilities for direct infringement. *Id.*

[17] District Court Decision, 259 F. Supp. 2d at 1044 ("While those who use Defendants' software do not pay for the product, Defendants derive substantial revenue from advertising. . . . The more individuals who download the software, the more advertising revenue Defendants collect. And because a substantial number of users download the software to acquire copyrighted material, a significant proportion of Defendants' advertising revenue depends upon the infringement. Defendants thus derive a financial benefit from the infringement.").

provided for free to encourage use that Respondents know will be overwhelmingly infringing (and in fact is).

Beyond this, in a conscious effort to evade responsibility for the rampant infringement they knowingly unleashed through the power of the Internet, Respondents deliberately designed a system that required little active participation from them (other than collecting advertising revenue that was generated with each infringing use) after a user had downloaded their software.[18] Allowing Respondents to escape liability after having provided the keys to the kingdom would reward them for masterminding and profiting[19] from massive copyright infringement simply because they designed their services so that they could avoid getting their hands dirty in each individual transaction.[20] Such a result is simply unconscionable and should not be countenanced by this Court.[21]

[18] Respondents designed their systems to not require central servers or user registration. *See* nn. 14 and 15 *supra*.

[19] *See, e.g.*, District Court Decision, 259 F. Supp. 2d at 1044 (noting millions in advertising revenues generated by Defendants/Respondents and that a "significant proportion of Defendants' advertising revenue depends upon the infringement").

[20] *See*, nn. 14 and 15 *supra* (no central server or user registration).

[21] Under the facts in this case, Respondents should also be held liable under a theory of vicarious infringement. *See, e.g., Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) ("one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."). It is beyond dispute that Respondents profited substantially from the copyright infringement they set in motion on their services. *See, e.g.*, District Court Decision at 1043 ("Here, it is clear that Defendants [Respondents] derive a financial benefit from the infringing conduct. The ability to trade copyrighted songs and other copyrighted works certainly is a 'draw' for many users

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II. THE PROTECTION OF COPYRIGHT INTERESTS AND THE FREEDOM OF OTHERS TO ENGAGE IN UNRELATED AREAS OF COMMERCE HAVE BEEN WELL SERVED BY THE BALANCE STRUCK IN *SONY*, AND THAT BALANCE SHOULD REMAIN UNDISTURBED.

While the facts in this case plainly call for the imposition of secondary liability for copyright infringement, the balance struck by this Court in its landmark *Sony* decision over two decades ago need not and should not be undercut or diluted. In *Sony*, this Court struck a balance between the sometime competing goals of providing copyright owners with adequate protections and preserving the freedom of others to engage in substantially unrelated areas of commerce. That decision, which declined to impose secondary copyright infringement liability where a product's or service's predominant use is legitimate and non-infringing, even where the products' manufacturers had general knowledge of infringement, has protected the

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of Defendants' [Respondents'] software. As a result, Defendants [Respondents] have a user base in the tens of millions.").

Defendants further have purposefully designed their systems so as to avoid having the ability to control the uses of their services once their software is downloaded. Respondents' systems used decentralized file-sharing to purposefully avoid the ability to control infringing uses of their software. See n. 14 (regarding lack of centralized server as distinguished from Napster) and n. 15 (regarding inability to identify and/or terminate users). Moreover, Respondents refused to incorporate the use of available filtering technologies to prevent unauthorized copying and sharing of copyrighted materials, despite doing so for pornographic materials. *See* n. 5 (regarding use of filtering technology to screen pornographic files). The fact that Respondents deliberately tied their own hands after setting into motion massive copyright infringement, from which they continue to profit, should not immunize them from vicarious infringement liability.

interests of copyright owners and at the same time allowed new and innovative unrelated areas of commerce to flourish. Over the past two decades, for example, an unprecedented explosion of technology has occurred, leading to not only the Internet and a computer in nearly every home and office, but also to exciting entertainment related innovations, such as iPods, MP3 players, CD burners, and TiVo® (some of which, like the VTR in *Sony*, could potentially be used for infringing purposes), as well as to numerous legitimate online music products and services. All of these products and services are sold and/or supplied by NARM members.

Technological innovations made possible under *Sony* have enhanced and improved the authorized dissemination of copyrighted works to the public, serving the very purpose of copyright law to encourage wide dissemination of creative works. "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of *promoting broad public* availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (emphasis added). The balance struck by *Sony* and the fundamental rationale at the core of this Court's decision in that case continue to serve this purpose. That rationale remains as vibrant today as when it was articulated over twenty years ago, and should remain unchanged.

While the unique facts in this case plainly justify the imposition of liability for contributory and vicarious copyright infringement, secondary liability for copyright infringement should continue to be applied sparingly. As this Court noted in *Sony* when it borrowed from the staple article of commerce doctrine in patent law, "'[A] sale of an article which though adapted to an infringing use is also

adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce.'" *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 441 (1984) (citations omitted). This concern should continue to temper the application of the secondary copyright infringement doctrine to ensure that technology widely and predominantly used for legitimate and non-infringing uses can continue to be freely developed and sold in commerce without fear of liability.

Conversely, where a product or service, such as Respondents' services in this case, is knowingly used predominantly for copyright infringement, and where the provider of that product or service deliberately avoids employing available technologies that could identify and prevent such infringement, imposing liability will not unduly extend the copyright owner's monopoly so as to chill innovation and affect substantially unrelated areas of commerce. Services such as Respondents' do not serve the salutary goals embodied in the *Sony* doctrine. Such targeted application of secondary liability is also consistent with other provisions of the Copyright Act, such as the Fair Use Doctrine, which allows for certain unauthorized uses of works protected by copyright, including an individual using a product for producing a single copy for private, non-commercial use. 17 U.S.C. § 107 (2003); *see, e.g.*, *Sony*, 464 U.S. at 417.

CONCLUSION

Services like those of Respondents, which are specifically designed to facilitate and promote infringement, which depend financially on maximizing such infringement, and which are known to be used predominantly for copyright infringement, cannot be shielded from liability under *Sony*. The providers of such services should be held liable for the millions of acts of infringement they cause and to which they materially contribute. In so doing, however, the Court should take great care not to disrupt the balance this Court struck in *Sony*. Consumers, artists, suppliers, distributors, retailers and innovators of new technologies all have been well served by that balance, and there exists no reason to disturb it in this case. To the contrary, *Sony* itself clearly compels reversal of the judgment entered by the Court of Appeals below.

Respectfully submitted,

ALAN R. MALASKY
Counsel of Record
MELANIE MARTIN-JONES
HEATHER J. STEWART
PORTER WRIGHT MORRIS & ARTHUR, LLP
1919 Pennsylvania Ave., N.W.,
Suite 500
Washington, D.C. 20006
(202) 778-3000

Counsel for Amicus Curiae